IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER,
Petitioners,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY,
Respondents.

PETITION FOR CERTIORARI.

To the Honorable, the Judges of the Supreme Court of the United States:

First National Bank of Chicago, a corporation organized under the laws of the United States, and H. W. Rogers and James C. Rogers, partners, as H. W. Rogers & Brother, respectfully represent unto your Honors:

1. That for some years prior to the 10th day of May, 1903, Alexander Rodgers was a wholesale dealer in seeds in the City of Chicago, Illinois, and that on said day he was adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, and the Chicago Title and Trust Company, respondent herein, was duly ap-

pointed receiver, and subsequently trustee, of the estate of said bankrupt.

2. That the National Storage Company, respondent, is a corporation organized under the laws of Illinois to do, and is engaged in doing, a warehousing business in the State of Illinois and elsewhere. That some months prior to said 10th day of May, said storage company issued to said Alexander Rodgers sundry warehouse receipts which were similar except as to the quantities and dates; one of which said receipts is in the words and figures following:

Warrant No. 8401. Lot No. 1.

The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in div. B. Sec. 1, Fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson Street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

It is agreed that this Company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this Company shall, in the custody of the above property, be the agent of the holder of this warrant.

Storage and charges as per contract on file with this company, Chicago, August 31, 1900."

Chicago, Aug. 31, 1900.

(Signed) NATIONAL STORAGE COMPANY,
C. B. BOUTON,
President.
WALTER TOD,
Treasurer.

[CORPORATE SEAL]

That immediately thereafter said Rodgers endorsed and hypothecated thirteen of said receipts to your petitioner, the First National Bank of Chicago, to secure loans made by it to him aggregating about $12,000 and endorsed and hypothecated five of said receipts to your petitioners, H. W. Rogers & Brother to secure a loan by them to him of $5,000, and that said loans are still unpaid and due to petitioners respectively, and said petitioners, at the time said Rodgers was adjudged a bankrupt, held and still hold said warehouse receipts as security for said loans respectively.

3. That on the 13th day of May, 1901, said Chicago Title and Trust Company, as said receiver, filed in said District Court (Rec., 5), a petition reciting that it had taken possession of the seed mentioned in said warehouse receipts, and asking the court's directions in respect to a sale thereof. That to said petition each of these petitioners filed a special appearance, specially objecting to the jurisdiction of said District Court over said seed, and such petitioner, as did also said National Storage Company. (Rec., 8-20). That thereupon (Rec., 28) the court referred said petition to a referee to take proof and report his conclusions; that the referee took proof and reported (Rec., 29-45) that the seed covered by said warehouse receipts was, at the time of the adjudication in bankruptcy, in the possession of said Storage Company, that the District Court was without jurisdiction, and recommending a dismissal of said petition.

That subsequently exceptions to said report were heard by said District Court, and it confirmed the referee's finding as to possession, but overruled his finding as to jurisdiction, and held it had jurisdiction, and ordered (the petitioner, First National Bank, consenting) that said

seed be sold and the proceeds thereof be deposited with said First National Bank, subject to the further order of said court (Rec., 54); that said seed was sold, and the amount realized therefrom was in excess of the amounts of petitioners' said claims, and this money is still in the hands of the petitioner, the First National Bank.

That said petitioners thereupon severally filed petitions in said court, asking payment of their said claims out of said proceeds. (Rec., 67-80.) That said Chicago Title and Trust Company, as trustee, and the respondents, James A. Patten, and E. W. Bailey & Company as creditors, answered said petitions, denying the right of your petitioners to said fund; and thereupon said petitions were referred to said referee to take additional proof and report the same to the court (Rec., 109), and the said matter again coming before the court upon the report of said referee and exceptions thereto, said petitions of your petitioners were consolidated, and the court confirmed said report of said referee, except so far as it found a lack of jurisdiction in said District Court, and adjudged that said District Court had jurisdiction; that said decree also found that said Storage Company was, at the time of the filing of the bankruptcy petition herein, in the possession of, and entitled to possession of, said seed, and decreed that petitioner, First National Bank, retain out of said proceeds the sum of $9,854.15 on account of its claim, and pay therefrom to petitioners, H. W. Rogers & Brother, $5,000.

That thereupon said Chicago Title and Trust Company, as trustee, and said James A. Patten severally perfected appeals from said order or decree to the Circuit Court of Appeals of the Seventh Circuit.

That thereafter said two appeals were duly filed in said

Circuit Court of Appeals, and were there, by order of court, consolidated and heard as one case. (Rec., 396, 400.)

That said Circuit Court of Appeals thereafter filed its opinion in said consolidated causes (Rec., 377) reviewing the question of fact whether the Storage Company was in possession of said seed at the time of the proceedings in bankruptcy, and held that said District Court had erred in deciding this question of fact, and overruled said District Court upon said question of fact, and decided that said Storage Company was not in possession of said seed, and remanded said cause with directions to enter a decree for said trustee.

That thereafter these petitioners filed a petition for rehearing in said cause, which was subsequently denied. (Rec., 394.)

That your petitioners are advised by counsel that there existed in law no right of appeal by said trustee or said Patten from said order of said District Court, and that, if said alleged attempts to appeal should be treated strictly as appeals, said Circuit Court of Appeals was without jurisdiction of the subject-matter, and its said order reversing said decree of the District Court was null and void.

That your petitioners are also advised by counsel that, if said appeals rightly could be, and were, treated by said Circuit Court of Appeals as in effect petitions for revision, said Circuit Court of Appeals, by the express terms of the bankruptcy statute, was limited in its jurisdiction to a revision of the decision of the District Court in matter of law, and that said Circuit Court of Appeals, in reversing said District Court upon the said question of fact, proceeded without jurisdiction, and in violation of the said statute.

That your petitioners are advised by counsel that under the law of Illinois, the facts above enumerated created at least an equitable lien upon said seed in favor of each of these petitioners, even if said Storage Company did not properly take and retain possession of said seed, and that the question whether, under the present bankruptcy statute, the trustee takes title subject to, or superior to an equitable lien in favor of creditors, especially where such lien is recognized by the state law, is a question upon which the Circuit Courts of Appeals of the several circuits are in conflict, and that by reason whereof, and because said question is one of gravity and importance, said question ought to be decided by this court.

That your petitioners present herewith and make a part of this petition, a certified transcript of the record of this cause in the Circuit Court of Appeals.

Wherefore your petitioners pray that this court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, directing it to certify to this court a record of its proceedings in said cause.

FIRST NATIONAL BANK OF CHICAGO, and
H. W. ROGERS & BROTHER,
By HENRY S. ROBBINS,
Their Solicitor.

WALLACE HECKMAN,
Of Counsel.

United States of America
Northern District of Illinois } ss.
Northern Division.

Richard J. Street, being duly sworn, says that he is Cashier of the petitioner, the First National Bank of Chicago; that he has read the foregoing petition and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters therein stated to be upon information and belief, and to those, he believes said petition to be true.

RICHARD J. STREET.

Subscribed and sworn to before me, this 30th day of October, A. D. 1903.

MARTIN HOWARD FOSS,
Notary Public.

[NOTARIAL SEAL]

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Petitioners,

vs.

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Respondents.

BRIEF ON MOTION FOR CERTIORARI.

A *certiorari* is here sought upon the following grounds:

1st. That the Circuit Court of Appeals was without jurisdiction, as no appeal is provided in such a case.

2nd. That, if the appeal could be treated as a petition for revision, still that court was without jurisdiction because it reviewed and reversed the District Court upon a *question of fact,* when, by the bankrupt statute (Ch. IV, Sec. 24 *b*), its jurisdiction is expressly confined to revision "in matter of law."

3rd. That the question here involved—whether a trus-

tee in bankruptcy takes the estate subject to, or free from, a lien, which, by the state law is valid except as to purchasers without notice, and execution or attachment creditors—is of such general importance, and there is upon it such a conflict of decisions in the different circuits, that this court should settle the question.

4th. That the Circuit Court of Appeals erred in refusing to uphold such a lien in favor of petitioners.

STATEMENT OF FACTS.

The National Storage Company is incorporated under the laws of Illinois to do, and does, a general warehousing business. It belongs to a class of warehousemen which is the product of the modern effort to minimize the cost of transacting business. These warehousemen do not have central warehouses to which all their depositors resort, but lease portions of buildings or yards convenient to factories, take possession thereof, receive and store therein goods which it is inexpedient or too expensive to cart to a distant warehouse, and issue therefor regular warehouse receipts, by the delivery of which the property is conveniently sold or pledged.

This system of warehousing has come into extensive use, especially in the south and elsewhere where business expediency requires iron ore and like bulky goods to be stored. When properly conducted it has received, and we think should receive, the recognition and protection of the law. When not properly conducted and the possession of the warehouseman is not adequately maintained, the law will, and should, refuse to sustain the warehouseman's title.

Alexander Rodgers, for some years prior to being adjudged a bankrupt on May 8, 1901, was a wholesale dealer in seeds in Chicago. About nine months before this date he applied to this company for storage facilities. This resulted in Rodgers executing to the Storage Company a written lease of portions of certain floors of Rodger's business premises. (Rec., 131.)

Upon these leased premises the seeds in controversy were placed, certain signs indicating the Storage Company's control of the premises as a warehouse were posted up and maintained, and upon the written application of Rodgers, the Storage Company issued to him warehouse receipts, of which the following is a sample:

"Warrant No. 8401. Lot No. 1

The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in Div. B. Sec. 1, fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

It is agreed that this Company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this Company shall, in the custody of the above property, be the agent of the holder of this warrant.

Storage and charges as per contract on file with this company. Chicago, August 31, 1900."

CHICAGO, August 31, 1900.

(Signed) NATIONAL STORAGE COMPANY,
C. B. BOUTON, *President.*
[CORPORATE SEAL] WALTER TOD, *Treasurer.*

Thereupon Rodgers endorsed and hypothecated some of these receipts to the petitioner, the First National Bank of Chicago, to secure loans amounting to $12,000, and others to petitioners, H. W. Rogers & Brother, to secure a loan of $5,000.

When thereafter Rodgers was adjudged a bankrupt, the receiver reported to the court that he had taken possession of the seed here in controversy and applied (Rec.,

5) for instructions respecting its immediate sale. Thereupon the petitioner, the First National Bank, filed a pleading which recites its appearance "for the sole purpose of denying the jurisdiction of this court to enter an order as prayed in and by" said petition, and "for the sole purpose of supporting its said objection, shows to the court," etc., and after setting up the facts giving rise to its claim, asks that the petition be dismissed as to said bank and the property covered by its warehouse receipts for want of jurisdiction. (Rec., 11.) At the same time petitioners, Rogers & Brother, filed a similar pleading, as did also the National Storage Company. (Rec., 12, 16.)

Thereupon the District Court, of its own motion, referred the matter to a referee to take proof and report his conclusions.

Subsequently, the referee filed a report in which he found that the bankrupt was not, when the bankruptcy proceeding was begun, in possession of the seed in controversy; that said Storage Company was then in possession thereof, that its said receipts were valid under the laws of Illinois and were transferable by endorsement, and that the endorsement of the receipts by the bankrupt to these petitioners constituted a valid pledge to them of the property represented by such receipts, and that the District Court for that reason was without jurisdiction, and recommending that the petition be dismissed as to the property covered by these receipts. (Rec., 44.)

The District Court overruled the referee's findings as to jurisdiction and sustained its jurisdiction. It then directed a sale of the seed, and the proceeds were placed, and still remain, in the custody of the First National Bank subject to the order of the court.

The question of jurisdiction being thus disposed of, so far as the District Court was concerned, these petitioners and the Storage Company filed supplemental petitions, claiming liens upon the proceeds of the sale. (Rec., 67-82, 100.)

It will thus be seen that neither these petitioners nor the Storage Company did, at any time, "consent" to be sued in the District Court, but in the proper manner and at all proper times objected to its exercise of jurisdiction, and did not enter into a trial on the merits until that court had determined to exercise jurisdiction.

The District Court, on final hearing, confirmed the referee's report, except so far as it found that the bankrupt court was without jurisdiction, and decreed "that the National Storage Company was * * * at the time of the filing of the petition in bankruptcy herein, entitled to possesion and had possession of said property," and that the petitioner, the First National Bank, retain, of the fund in its hands, $9,854.15, with interest, and pay over to the petitioners, H. W. Rogers & Brother, $5,000, with interest.

Thereupon the trustee and James A. Patten (a general creditor of the bankrupt) severally perfected appeals to the Circuit Court of Appeals, which, though severally docketed, were there consolidated (Rec., 396, 400) and disposed of as one case. That court overruled the finding of fact of the District Court that the Storage Company was, when the bankruptcy petition was filed, in possession of the seed in controversy, found from the evidence that it was not so in possession, and upon this ground reversed and remanded, with directions to enter a decree for the trustee.

I.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

The first question here is, what is the nature of this proceeding in the District Court?

In *Bardes* v. *Hawarden Bank,* 178 U. S., 524, this court pointed out the distinction between a proceeding in bankruptcy and an independent suit by the trustee in a District Court, and held that the latter could not be brought "unless by consent of the proposed defendant."

As neither of these petitioners consented to be sued in that court, the proceeding there cannot be deemed an independent suit, nor, as such, be the basis of an appeal to the Circuit Court of Appeals under the act establishing those courts.

The Circuit Court of Appeals sustained jurisdiction of the District Court upon the ground that, it having taken possession of the property and converted it into money, the fund was in *custodia legis.*

These petitioners had but a lien upon the property. The title was in the bankrupt at the time of the adjudication—this regardless of the question who was then in possession. The District Court, in seizing it and converting it into money, was acting as a court of bankruptcy. Its only justification for acting was under its authority, as such a court to collect the assets of the bankrupt. This proceeding in the District Court was a part of the bankruptcy proceedings and was so entitled. It follows then that in that court this case was a proceeding in bankruptcy. Indeed, this

same Circuit Court of Appeals has, in a similar case, distinctly so held.

In re Antigo Screen Door Co., 123 Fed., 249, that court, speaking through the same learned judge who wrote the opinion in the case at bar, said:

"Here the petitioner was in possession of property claiming under the chattel mortgages in question. It was agreed that the property should be turned over to the trustee for sale by him, the proceeds to be covered into the registry of the bankruptcy court, the right of property to follow the fund. This being done, and the fund being placed in the registry of the bankruptcy court and in the bankruptcy proceedings, did that court have the right to determine, as a court of bankruptcy and in the bankruptcy proceedings, the respective rights of the parties to that fund? * * * The question remains whether such a proceeding arises strictly on the bankruptcy side of the court, or comes within the general rule governing intervening petitions against a fund in court. * * *

"We are disposed to hold (although the question is one not free from difficulty) that the order is one made in the bankruptcy proceedings proper. * * * The mortgaged property was in equity the property of the bankrupt, subject to such lien as the mortgagee had thereon. If its value was in excess of a valid lien, that excess would go to the trustee. When, therefore, the property was turned over to the trustee as the property of the bankrupt, subject to the lien, the trustee held the property and its proceeds as assets of the bankrupt and in the bankruptcy proceedings. * * * That fund was potentially in the custody of the court in the bankruptcy proceedings as assets of the estate and was subject to the disposition of the bankruptcy court in that bankruptcy proceeding, under section 2 (7) of the bankruptcy act (act July 1, 1898, 30 Stat., 546, c. 541 [U. S. Comp. St., 1901, p. 3421],) which empowers the court to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as herein otherwise provided.' We are the more inclined to adopt this construction of the act because thereby a speedy

and inexpensive method is afforded of determining controversies with respect to a fund, and the policy of the bankruptcy act, as we think, sanctions this summary mode of procedure, the parties consenting thereto."

In

Hutchinson v. *Otis,* 190 U. S., 552,

this court held that a petition asserting a lien upon a fund in the hands of a trustee was a bankruptcy proceeding and not an independent ground of appeal.

The proceeding in the District Court being, then, "a proceeding in bankruptcy," the only jurisdiction which the Circuit Court of Appeals had thereof arose out of the following provisions of the bankruptcy act of 1898:

Sec. 24 (*b*): "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Sec. 25 (*a*): "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit:

(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) From a judgment granting or denying a discharge; and

(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

The order of the District Court appealed from was not "a judgment allowing or rejecting a debt or a claim." It merely sustained liens upon a fund ample to discharge them. Petitioners' assertion of a lien upon this fund cannot even be said to be an *incident* to the proof of their claims. The authorities agree that a judgment in a proceeding by

or against a lien holder, which merely establishes or rejects the lien, and does not decide whether a claim is a provable debt in bankruptcy, is not a judgment allowing or rejecting the debt or claim within Sec. 25 (3) above.

In re Rouse, Hazard Company, 33 C. C. A., 356; 91 Fed., 96 (7th Cir.).

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808 (1st Cir.).

In re Abraham, 35 C. C. A., 592; 93 Fed., 767 (5th Cir.).

In re Whitener, 44 C. C. A., 434; 105 Fed., 180 (5th Cir.).

Hutchinson v. *Otis,* 190 U. S., 552.

It follows, then, that no *appeal* lay from the District Court to the Circuit Court of Appeals, and that the only jurisdiction the latter court had was under Sec. 24 *b* upon a petition for revision.

In re Rouse, Hazard & Co., 33 *C. C. A.,* 356; 91 Fed., 96 (C. C. A. of 7th Circuit).

No petition for revision was filed by respondents. They perfected *appeals,* and it was upon these that the Circuit Court of Appeals assumed jurisdiction, and reversed the District Court, and this, not upon a matter of law, but upon the ground that the District Court, in holding possession to have been with the Storage Company at the time of the adjudication, had erred upon the facts.

The procedure upon appeal differs so much from that upon revision that some of the courts hold that an appeal, where there is no right of appeal, cannot be treated as a petition

for revision, but should be dismissed for want of jurisdiction.

In re Whitener, 44 C. C. A., 434; 105 Fed., 180.

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808.

In this view, the Circuit Court of Appeals should, when the point of jurisdiction of the subject-matter was made—and although it was made only in the petition for rehearing—have dismissed the appeals; for in

M. C. & L. M. Ry. Co. v. *Swan*, 111 U. S., 379,

this court said (p. 382):

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

On the other hand, some of the courts hold that the Circuit Courts of Appeals may treat an appeal, when improper as such, as a petition for revision and adjudicate it as such.

Chesapeake Shoe Co. v. *Seldner*, 122 Fed., 593.

If, in this view, the Circuit Court of Appeals was justified, in treating these appeals as petitions for revision,—and it is only in this way that its jurisdiction can be sustained

at all,—still it should not have disregarded, as it did, the plain provisions of the bankrupt act confining its jurisdiction in revision to "matter of law." Indeed, it is an anomalous situation when the same Circuit Court of Appeals at the same time has two similar cases under advisement, each of which it must have treated as a petition for review to justify its jurisdiction, and delivers two opinions by the same judge upon the same day, in one of which (*In re Antigo Screen Company, supra*) it says:

"We are not at liberty upon a petition for review to challenge the facts, or an inference of fact, found by the court below. We may only consider and rule upon a question of law."

while in the other (the case at bar), it reverses, not upon a question of law, but upon the facts.

Thus, in either view, it is clear that the Circuit Court of Appeals has proceeded without jurisdiction and disregarded the plain provisions of the bankrupt act, thereby depriving these petitioners of a large fund in court that is rightfully theirs.

II.

THE QUESTION OF THE SUPERIORITY OF AN EQUITABLE LIEN TO THE TITLE OF THE TRUSTEE IN BANKRUPTCY, AND THE CONFLICT OF DECISIONS THEREON.

Upon the nature and extent of a lien the decisions of the courts of the state where the property is located will be followed by the Federal courts.

Etheridge v. *Sperry*, 139 U. S., 266.
In re Antigo Door Co., 123 Fed. 249, 253, and cases cited.

In the present case the Circuit Court of Appeals conceded that it was "in duty bound to defer to the law of the state in respect of the property within that state."

Under the law of Illinois petitioners had equitable liens upon the seed in controversy, if the Storage Company was derelict in taking or retaining possession. This identical question is conclusively settled by

Union Trust Co. v. *Trumbull,* 137 Ill., 146.

That case involved warehouse receipts of this same Storage Company. The court held that "transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, both because the National Storage Company did not have possession and control of the wool, and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt." * * *

"It is, however, insisted, that even if there was no valid legal pledge of the wool which was in the warehouse at the time of the assignment, yet that, under the circumstances of the case, the holders of the warehouse receipts are entitled to an equitable lien thereon, which, although not recognizable at law, a court of chancery will enforce. * * * These receipts were issued by a duly incorporated storage company, and expressly stated upon their faces that the company had received and was in possession of the number of pounds of 'unwashed wool.' * * * The receipts, upon their faces, indicated that the storage company had complied with the law. * * * The receipt holders were without notice of any fact in derogation of the validity of their receipts. There was an intention and an ineffectual attempt

to secure the repayment of the borrowed moneys by creating valid legal pledges. Equity regards that done which ought to be done. * * *

"It is to be noted that the holders of the receipts stand upon a very different footing from that upon which the National Storage Company stands. They were entirely ignorant of the illegal arrangements which were entered into between that company and the firm of T. W. Hall & Co. in respect to possession, substitution, etc., and they stand before the court in the attitude of the victims of the frauds which it is the intention of the statute to guard against. * * * In Powell on Mortgages, 459, it is said:

'It is a general rule, that whenever a right in equity attaches against a person, that equitable right binds all persons claiming under or against that person who have not special liens on any of the property, and hence it follows that general creditors are in all cases bound by a particular equity.'"

The court then sustained equitable liens in favor of those receipt holders against an assignee for the benefit of creditors.

Even if in the case at bar the Storage Company be held to have inadequately taken or retained possession, there is nothing in the record to show that these petitioners knew of this, or participated in any way in it. Warehouse receipts, legal in form, are presented to them by Rodgers as security, and they in perfect good faith and without the slightest knowledge that the receipts were not the valid evidences of legal title they purported to be, made the loans here involved. Under the foregoing case they thereby acquired under the Illinois law at least an equitable lien upon this seed. There were no exe-

cution or attachment creditors when the petition in bankruptcy was filed or Rodgers was adjudged a bankrupt.

Furthermore, if the Storage Company did not have possession, Rodgers knew it when he obtained the loans, and was guilty of a legal fraud upon these petitioners. These facts would estop Rodgers from claiming that these receipts were not valid pledges. The question is thus raised whether an estoppel, binding upon the bankrupt, is not also binding upon his trustee in bankruptcy. If not, then the trustee and creditors are permitted to profit by the misconduct or fraud of the bankrupt.

The following cases hold a trustee in bankruptcy estopped when the bankrupt is:

In re Standard Laundry Co., 116 Fed., 476.
Pennington v. *Hunt*, 20 Fed., 195.

Upon the question whether the trustee in bankruptcy takes subject to equitable liens, etc., the decisions in the different circuits are in direct conflict.

In re New York Economical Printing Co.,
49 C. C. A., 133; 110 Fed., 514,

the Circuit Court of Appeals of the Second Circuit held that a chattel mortgage, which had ceased to be valid as against the mortgagor's creditors or purchasers because not re-filed within a year, as required by the New York statute, was a lien that was superior to the title of the trustee. The court said:

"It remains to consider whether the trustee can take advantage of the noncompliance with the statute. It has always been held by the courts of New York that only such creditors can take advantage of it as are armed with some legal process authorizing the seizure of the mortgaged property, and are thereby in a position to enforce a lien upon it

[citing New York cases], and that the mortgage is good as to creditors at large as well as between the parties. * * *

The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors. The lien of the present mortgage 'would not have been valid as against the claims of the creditors', within the terms of subdivision 'a', if the creditors had obtained the right to question it; but otherwise it was valid. * * * We think these provisions ought not to be extended by construction to cover cases which are not distinctly within their terms, for the purpose of subverting liens which have originated in good faith, which have remained unchallenged at the time of the commencement of the bankruptcy proceeding, and which no creditor of the bankrupt could ever have attacked successfully except at the option of the debtor. We conclude that, except as to the Reilly judgment, the lien of the mortgage was valid, and that the trustee is entitled only to the amount of that judgment out of the proceeds in the registry of the court."

The same court announced the same rule in

In re Garcewich, 53 C. C. A., 510; 115 Fed., 87,

saying:

"Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition

that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

The court pointed out the distinction between a *bona fide* lien and attempts to reserve liens which were fraudulent in law, and held the lien in that case not valid as against the trustee because, by the agreement, a lien was attempted to be created upon a stock in trade which the bankrupt was allowed to sell, and likened such a transaction to a chattel mortgage where the right of the mortgagor to retail goods was reserved.

In

In re Standard Laundry Company, 53 C. C. A., 644; 116 Fed., 476,

the Circuit Court of Appeals of the Ninth Circuit held that, when a bankrupt had bought property by bill of sale subject to a chattel mortgage which he assumed to pay, a lien was thereby created that was valid as against the trustee in bankruptcy, although the mortgage was void as to creditors because not executed in accordance with the California chattel mortgage statute. The court said:

"The transaction between Muller and the Standard Laundry Company was *bona fide*. The Standard Laundry Company bought the property in good faith subject to the mortgage. By the terms of its purchase of the property it is estopped from denying the validity of the mortgage or of its own obligation to Muller. In a case of this character the trustee, representing the creditors, stands in the shoes of the laundry company, and is in privity with it, so far as the title of the property is concerned. He has the same rights that the laundry company has; no more. As the bankrupt is estopped from denying the validity of the mortgage, so is the trustee,"

and, after a review of the cases, held that the trustee in bankruptcy, under the present statute, takes title, as did the assignee under the former act, subject to equities and liens which exist against the property in the hands of the bankrupt.

In

Josephson, 116 Fed., 404,

the District Court for the Western District of Georgia held that the trustee in bankruptcy took property subject to the lien of an unrecorded chattel mortgage, which was valid *inter parties* under the law of Georgia, Judge Speer saying:

"This is a contest between equities. * * * It is quite clear that no court of the United States would be justified in concluding that congress intended to change with radical purpose the property laws of a state unless that purpose can be gathered from explicit and unequivocal terms of the act of congress. * * * It also may be said that if congress should, by sweeping enactments, declare that every lien, by means of which the commercial and agricultural people in many states of the Union obtain credit, should necessarily be placed upon record, in view of their slender means it would practically destroy their capacity to take part either in commerce or in manufacture or to carry on their agricultural operations successfully. This is true particularly of the southern states. The legislature of each state clearly understands the necessity of its own people. The legislature has the right to determine whether it is best to have these liens recorded."

In

Chattanooga Bank v. *Rome Iron Co.*, 102 Fed., 755,

Judge Newman of the Northern District of Georgia upheld, as against the trustee in bankruptcy, an equitable lien upon an equity in property stored with a storage company similar to the National Storage Company, saying (p. 759):

"Since the argument of this case I have been handed by

counsel for the trustee a recent decision by Judge Bellinger, of Oregon, in the case of *In re J. S. Booth*, 3 Am. Bankr. Rep., 574, 98 Fed., 975, in which it is said, without citing authority, that the trustee in bankruptcy stands in the position of an innocent purchaser without notice. If this is the law, it would seem to defeat this lien, because it seems entirely clear that an innocent purchaser from the Rome Iron Company, without notice of the pledge of the Chattanoooga National Bank, would have obtained a good title; but I must, with the utmost respect, differ with Judge Bellinger as to his opinion of the position in this respect of a trustee in bankruptcy."

And after comparing the present bankrupt act with that of 1867, and the decisions under the latter, he proceeds:

"I am unable to see how any distinction can be drawn, favorable to the contention of counsel for the trustee, between the two acts. The purpose of both acts, although different language is used, seems to be to vest in the trustee the title to the entire estate of the bankrupt; and no distinction can be perceived which justifies the inference that under the last act the trustee takes the property of the bankrupt as an innocent purchaser, without notice, and that in the former he did not."

In

In re Hinsdale, 111 Fed., 502,

there was a conditional sale of property which, by the statute of Vermont, was not, unless recorded, "valid against attaching creditors or subsequent purchasers," but the court (Wheeler, D. J.) held it valid as against the trustee in bankruptcy, saying:

"This statute applies only to such as come within its description. * * * The trustee is neither an attaching creditor nor subsequent purchaser, but is a successor, like an executor or administrator, taking the title of the bankrupt."

In

In re Sewell, 111 Fed., 791,

the District Court of Kentucky (Cochran, D. J.), held that a conditional sale, that by the statute of Kentucky was not valid against cerditors until recorded (this statute being construed to mean only creditors who had acquired liens), was, although not recorded, valid as against the trustee in bankruptcy, saying (p. 794):

"That an assignee in bankruptcy takes the property assigned subject to any liens on it that might have been asserted against it in the hands of the assignor, other than such as are avoided by the bankrupt act itself, has been decided by the Supreme Court in the case of *Stewart* v. *Platt*, 101 U. S., 731; 25 L. Ed., 816."

On the other hand, the Circuit Court of Appeals of the Seventh Circuit in this case holds the title of the trustee in bankruptcy superior to that of the petitioners, and is supported in this by other Federal courts, including the Circuit Court of Appeals of the Eighth Circuit.

The Circuit Court of Appeals holds in effect that the filing of a petition in bankruptcy, followed by adjudication "is a seizure of the property by legal process, equal in rank to and of the same force and effect as an execution or attachment. * * * It is said by the Supreme Court in *Mueller* v. *Nugent*, 184 U. S., 1-14, 'It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world and in fact an attachment and injunction."

That court seems to base its decision in the present case upon what this court said in the *Nugent* case, failing to notice that the facts in the two cases are entirely different. In the *Nugent* case the trustee in bankruptcy sought by summary proceeding to recover property in the hands of an *agent* of the bankrupt. This court, in using the language above quoted, refers to the case of *Bank* v. *Sherman*, 101 U. S., 403. That was a case in which the only question involved was whether the title of the assignee in bankruptcy

was superior to a conveyance made after the petition, and before the adjudication, and this court held, as respects this situation, that "the filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction."

But this court held under the bankrupt act of 1867, that the assignee took "subject to all legal and equitable claims of others not in fraud of the rights of general creditors. They would be affected by all the equities which could be urged against him."

Houselt v. *Harrison,* 105 U. S., 401, 406.
Yeatman v. *Savings Inst.,* 95 U. S., 764.
Stewart v. *Platt,* 101 U. S., 731.

Under these cases it is plain that under the act of 1867 the equitable lien of these petitioners would have prevailed against the assignee in bankruptcy.

Thus the Circuit Court of Appeals seems to have decided this case upon an erroneous conception of the construction which this court has put upon the act of 1867.

This conflict in the decisions of the different circuits seems to present a case for *certiorari* in order to secure uniformity of laws, which is mentioned as a ground of *certiorari* in *Forsyth* v. *Hammond,* 166 U. S., 506-14.

That writs of *certiorari* may be issued from this court in bankruptcy cases is beyond dispute.

Bankr. Act of 1898, ch. 4, sec. 25d.
Bryan v. *Bernheimer,* 181 U. S., 188.

Respectfully submitted in the belief that the writ of *certiorari* should issue.

WALLACE HECKMAN,
HENRY S. ROBBINS,
Counsel for Petitioners.

No. 479.

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SUPREME COURT

ADDENDUM TO PETITIONERS' BRIEF ON MOTION FOR CERTIORARI IN

The First National Bank of Chicago, et al.
vs.
The Chicago Title & Trust Company, Trustee, et al.

As further illustrating the conflict of decisions in the different Circuit Courts of Appeal upon the question of the character and extent of the title of the trustee in bankruptcy, we call attention to a decision (just published) of the Circuit Court of Appeals of the Third Circuit, in

First Nat'l Bank v. *Pennsylvania Trust Co.*,
124 Fed., 968.

There a bank made a loan to a steel company, taking as security a bill of sale of a quantity of steel billets, set apart on the premises of the company and marked with signs as the banks' property. After the loan, but without the knowledge of the bank, these signs were removed, but it caused them to be replaced before the bankruptcy, and the Circuit Court of Appeals held the bank's lien superior to the title of the trustee in bankruptcy, saying:

> "It may be that an innocent purchaser for value, or a judgment creditor without notice, might, by execution and levy, have acquired a prior lien; but surely, as against the pledgor, the bank's lien remained, notwithstanding the removal of the signs. Neither the general creditors nor the receiver of the bankrupt could acquire any better title to any property of the bankrupt than the bankrupt himself had at the time of filing the petition in bankruptcy, and therefore the lien was good as against them. The receiver in bankruptcy, standing in the place of the trustee, takes the property in question "as a purchaser from the bankrupt, with notice of all outstanding rights and equities." Whatever the bankrupt might do to make the property available to the general creditors, he may do nothing more, except that he may sue for and recover that which was conveyed in fraud of creditors."